A **PEMBINAAN SUCI KESTURI SDN BHD**

v.

MALAYAN BANKING BHD

B HIGH COURT MALAYA, KUALA LUMPUR
ANANTHAM KASINATHER J
[SUIT NO: D-22-NCC-1732-2010]
7 APRIL 2011

C ***BANKING:*** *Banks and banking business - Recalling of loan - Banking facility subject to fulfilment of condition precedent - Whether compliance with condition precedent mandatory - Whether terms mutually agreed before signing of facility agreement - Whether recall of facility amounted to breach of contract or negligence*

D The plaintiff entered into a Collaboration Agreement with PT Techniteam Indonesia ('PTTI') to canvass and thereafter perform, install and maintain telecommunication towers in Indonesia. Consequently the plaintiff had approached the defendant for banking facilities to fund their contractual obligations in Indonesia. E The defendant thus issued a letter of offer to the plaintiff, subject to the fulfilment of conditions precedent ('CP') by the plaintiff as a pre-condition to the release of the banking facilities, which was duly accepted by the plaintiff. However, cl. 5(d) which stated that 'a charge on the Collection Account of PTTI with PT Bank F Maybank Indocorp' was not possible, according to Indonesian law. The defendant meanwhile recalled the banking facilities on the basis that the plaintiff had failed to comply with cl. 5(d) of the letter of offer. It was the plaintiff's case that the defendant's recall of the banking facilities already granted to it premised on the G plaintiff's failure to comply with the charge clause amounted to a breach of contract and/or negligence on the part of the defendant.

H **Held (dismissing the plaintiff's claim with costs and dismissing the counterclaim with no order as to costs):**

(1) It was evident from the wording of cls. 3.1 and 3.2 that the defendant bank was entitled to insist on compliance by the plaintiff with all the CPs. In the event of any one CP I becoming impossible of performance, the defendant was

entitled to withdraw the facility altogether since the test of compliance is a subjective test. The question of the defendant being negligent for including the charge clause in the first instance did not arise because the terms of the contract were mutually agreed between the parties. (para 14)

(2) Further, cl. 3.3 stipulated that the defendant was entitled to waive the requirement for the plaintiff to comply with any one CP. However, the defendant in the exercise of the 'absolute discretion' conferred upon it by cl. 3.2 resolved to act otherwise. It was well within the province of the defendant to do so. On the facts, the defendant was entitled to include fresh requirements to fortify its already existing security. (para 14)

(3) The defendant was also entitled to withhold the release of the facilities upon the refusal by the defendant's solicitors to provide the confirmation of compliance by the plaintiff with the charge clause. The defendant could not be said to be in breach of contract so long as the confirmation of compliance was not forthcoming in the defendant's solicitor's letter as envisaged in cl. 13(iii). (para 14)

Case(s) referred to:

Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***

Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor [1999] 1 CLJ 1 SC ***(dist)***

Lee Chong Lim v. Standard Chartered Bank Malaysia Bhd [2004] 6 CLJ 447 HC ***(not foll)***

For the plaintiff - Mohamed Zaini Mazlan; M/s Zaini Mazlan

For the defendant - Shanti Mogan (Chai Siew Wan with him); M/s Shearn Delamore & Co

Reported by S Barathi

JUDGMENT

Anantham Kasinather J:

Background Facts

[1] Sometime towards the end of 2007, the plaintiff was canvassing for a project in Indonesia involving the acquisition of

A sites, the construction and maintenance of communication towers in that country (see Q & A 3 of WSPW 1). The obstacle confronting the plaintiff in securing this contract in its name was a decree by the Indonesian Government which stipulated that the ownership and management of Telecommunication towers in
B Indonesia could only be done by a domestic company. This compelled the plaintiff to enter into a Collaboration Agreement with P.T Techniteam Indonesia ('PTTI') as early as 20 May 2008 ('Collaboration Agreement'). Under this agreement, the plaintiff together with PTTI was to canvass and thereafter perform, install
C and maintain telecommunication towers in Indonesia for customers such as Nokia Siemens Network, Indosat and several others. The collaboration agreement envisaged the plaintiff undertaking the aforesaid work in consideration of paying a commission of 2% to PTTI. Pursuant to the execution of the collaboration agreement,
D a joint venture and Service Agreement were entered into between PTTI and PT Excelcomindo Pratama Tbk ('PT Excel') on 28 May 2008 for the construction of telecommunication towers in Indonesia ('JV Agreement'). Under the JV Agreement, PT Excel had the obligation to pay PTTI by remitting the contract
E proceeds to PTTI's account.

[2] The plaintiff had approached the defendant for banking facilities to fund their contractual obligations in Indonesia even before securing any contract. The defendant had evinced an
F interest to consider providing a financing package to the plaintiffs as early as 24 January 2008 (exh. 246 of B2). At the material time, the defendant had a presence in Indonesia through a Malaysia – Indonesian joint venture called PT Bank Maybank Indocorp ('Maybank Indocorp'). It is the plaintiff's case that it
G was in due course awarded two contracts for the construction and maintenance of telecommunication towers by PT Excel (see Q & A 8 of WSPW 1). Upon being informed by the plaintiff about these two contracts, the defendant by an email of 25 June 2008 warned the plaintiff about the Indonesian Government prohibiting
H foreign companies such as the plaintiff from erecting, owning and managing telecommunication towers in Indonesia (see Q & A 10 of WSPW 1). The plaintiff duly notified the defendant that this was not an issue since PTTI was a fully owned Indonesian company.

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[3] The defendant on 8 October 2008 issued a letter of offer to the plaintiff, offering banking facilities amounting to RM6,500,000 which was duly accepted by the plaintiff. Subsequently, both parties executed a facility agreement on 9 December 2008, together with other security documents as required by the defendant. It is not in dispute that the defendant required the fulfillment of conditions precedent ('CP') on the part of the plaintiff as a pre-condition to the release of the banking facilities. These pre-conditions included the following:

a) Fresh assignment of contract proceeds between the defendant and the plaintiff;

b) Power of Attorney by PTTI to assign all rights of the contract proceeds between the defendant and plaintiff for RM6,500,000;

c) Power of Attorney by PTTI to assign all rights of the contract proceeds to the plaintiff;

d) A charge on the Collection Account of PTTI with PT Bank Maybank Indocorp;

e) An irrevocable Letter of Instruction ('ILI') to be issued by the plaintiff to PTTI and/or PT Bank Maybank Indocorp to direct all contract payments due, to the Collection Account (to be opened at Jalan Pudu SSC);

f) 30% of Advance Payment Guarantee ('APG') amount to be deducted upon receipt of Advance Payment for CME works and for this amount to be subsequently placed as marginal deposits to partially reduce (ie, 50%) of the APG;

g) 85% of each Final Payment (CME & STRC) to be retained as Sinking Fund and subsequently used to retire maturing STRC's;

h) Assignment of Contract Proceeds by PTTI;

i) Irrevocable Letter of Instruction ('ILI') to be issued by PTTI to PT Excel to direct all payment due to the Collection Account (Account no. 100-00-0000073-6) with PT Bank Maybank Indocorp;

A j) A letter of guarantee to be issued by Export-Import Bank Malaysia Berhad ('EXIM Bank') for RM 6,500,000 80% EXIM Overseas Guarantee Facility (EOGF) coverage on total facility amount of RM 6,500,000; and

B k) Joint and several guarantee for RM6,500,000 to be executed by the following persons:

i) Azim Fahmy bin Bahari;

ii) Mohamed Nadzir bin Idris; and

C iii) Zainal Abidin bin Abu Bakar

(see Q & A 13 of WSPW 1)

[4] Following the execution of the letter of offer, the plaintiff in D purported compliance of the CP executed the facility agreement on 9 December 2008; the deeds of assignment; the Power of Attorney; secured a letter of guarantee from EXIM Bank guaranteeing 80% of the banking facilities; executed a letter of set off (third party); signed a memorandum of deposit of fix deposit E receipt and signed a general letter of indemnity for the facilities to be provided by way of bankers' guarantee (see Q & A 16 of WSPW 1).

[5] At the material time, Messrs Shamshuddhuha, Ho & F Partners were the Malaysian lawyers advising the defendant on the contract documentation. The Malaysian firm was being advised on Indonesian Law by the Indonesian law firm of DNC Advocates at Work. By a letter dated 15 January 2009, the Malaysian lawyers advised the defendant that CP 5(d) ie, "a charge on the G collection account on PTTI with PT Bank Maybank Indocorp" was not possible, according to Indonesian Law. This opinion was based on the advice of DNC Advocate at Work (exh. 257-262 of B2). Apparently, there is no such concept as a charge over a bank account under Indonesian Law. In the meantime, the defendant H through its letter dated 21 May 2009 recalled the banking facilities, on the basis that the plaintiff had failed to comply with cl. 5(d) of the letter of offer (charge clause).

Plaintiff's Case

I **[6]** The plaintiff's claim against the defendant is based on the following grounds:

a) The defendant in recalling the banking facility on 21 May 2009 had breached the facility agreement; and

b) The defendant was negligent in failing to ensure that all the terms specified in the letter of offer could be performed by the plaintiff.

The plaintiff thus claims:

a) General damages amounting to RM15,000,000;

b) Special damages amounting to RM3,414,200.36;

c) Exemplary damages; and

d) Interest at the rate of 8% per annum on the sum awarded by the court.

Defendant's Case

[7] The provision of the banking facilities was subject to CP which included securities to be provided by the plaintiff to the defendant for repayment of the banking facilities. The CP are set out in cls. 5, 6, 7, 8 and 9 of the letter of offer and Schedule 1 to the facility agreement. The principal security requested by the defendant to guarantee repayment of the banking facilities was a charge over the contract proceeds received in respect of the Indonesian Project by way of charge clause. This type of security is required by the defendant when providing contract financing against an assignment of contract proceeds. Pursuant to the facility agreement, the defendant was not obliged to release the facilities to the plaintiff if the CP were not fulfilled. Clause 3.1 of the facility agreement states as follows:

> The facility shall become available to the Borrower on the date the Lender has received the documents and evidence as listed in Schedule 1 in each case in form and content satisfactory to the Lender and upon fulfillment of the conditions set out in clause 4.1.

[8] The thrust of the submission of counsel for the defendant is that the plaintiff having agreed to comply with the CP is precluded from commencing this action for breach/negligence for the defendant's refusal to release the banking facilities when such refusal was caused by the plaintiff's inability to comply with charge

clause. Counsel for the defendant contended that to the extent that the banking facilities were in respect of a cross border transaction, the blame for the inclusion of charge clause in the original contract documents cannot be attributed to the defendant, particularly since the plaintiff was being advised by solicitors in both jurisdictions.

[9] Decision Of The Court

Issues

1) Where the bank includes a condition precedent incapable of compliance due to ignorance of foreign law and thereafter recalls the facility for non-compliance of this very condition precedent, is the bank liable in damages for breach of contract and/or negligence?

2) What are the damages payable to the plaintiff, in that event?

[10] Counsel for the plaintiff relied on three cases in support of his submission that the defendant's recall of the banking facilities already granted to it premised on the plaintiff's failure to comply with the charge clause amounted to a breach of contract and/or negligence on the part of the defendant. The first case relied upon by counsel was the case of *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor* [1999] 1 CLJ 1. In this case, the defendant finance company after having granted to its plaintiff's customer a bridging loan, as well as, a syndicated end-finance, failed to release any part of the end-finance. The plaintiff customer's cause of action was based on negligent misrepresentation and breach of collateral warranty. The evidence led in support of the two causes of action was that oral representations had been made on behalf of the defendant finance company assuring the plaintiff customer of the availability of the end-finance stipulated in the letter of offer. The learned trial judge made the following findings of fact in her judgment on the evidence:

> That the finance company's representative made two specific representations;
>
> i) That the finance company would have no difficultly in procuring the syndicated end-finance and that its availability was a certainty;

ii) That the first draw down of the end-finance would come during the first quarter of 1984: and these representatives assured and convinced PW1 that the project would be successfully completed with such end-finance. It was following these negotiations that AB 15 witness statement tendered and approved by the 1st Defendant with the granting of a bridging loan of RM3.5 million and a syndicated loan of RM26 million through their letter AB 17-22. It is this letter which the Plaintiffs rely to support their contention that the 1st Defendant had expressly or by necessary implication represented to the 1st Plaintiff that a syndicate end finance of RM26 million would be made available to the purchasers of Taman Mewah.

[11] The finding of the learned trial judge on negligent misrepresentation stemmed from the failure of the 1st defendant to secure for the plaintiff the syndication of the end-finance of RM26 million. In other words, the finding of the learned trial judge was that the representations amounted to a promise to provide the contractual end-finance irrespective of the participation by the other members of the syndicate.

[12] With respect, the facts of *Kluang Wood Product* are far removed from the facts of this case. This case relates to an alleged failure to release banking facilities due to non-compliance with CP whereas the *Kluang* case revolved around the construction of words in a document and whether a pre-contractual representation amounted to a collateral warranty. The construction issue revolved around the words 'total end financing facilities to be syndicated by HLFB' which formed the basis upon which the end finance facilities were granted. The question posed to the court was whether upon a proper construction of these words, HLFB (defendant) were unconditionally committed to making the end finance facility of RM26 million available to the plaintiff borrower. The majority judgment was that these words gave rise to an unconditional obligation on the part of HLFB to provide end finance to the borrower. The minority judgment of the court was that to the extent that syndicated loans invariably involved several parties coming together to provide the loan, these words should be construed as imposing an obligation on HLFB only upon the bank being able to successfully obtain the approval of all members of the syndicate to the granting of the end finance. Accordingly, the majority judgment of the court was that the lender was in

breach since the refusal of the other syndicated members to come forward with their share of the syndicated loan was irrelevant. In this respect, the representation of HLFB's representative that HLFB would have no difficulty in procuring the syndicated end finance and that the end finance would be available by a certain date was held by the lower court to be a collateral warranty.

[13] Applying the principles of law pronounced in the case of *Kluang*, the answer to the first issue posed at the beginning of this judgment requires an examination of several other clauses in the facility agreement. I set out below what I consider to be some of the relevant clauses:

> Conditions Precedent
>
> 3.1 The facility shall become available to the Borrower on the date the Lender has received the documents and evidence listed in Schedule 1 in each case in form and content satisfactory to the Lender and upon fulfillment of the conditions set out in clause 4.1
>
> Non-Fulfilment of Conditions Precedent
>
> 3.2 Pending fulfillment in the manner satisfactory to the Lender of the conditions precedent referred to in clause 3.1, the Lender may at its absolute discretion, terminate the Facility or suspend the utilization of the facility.
>
> Waiver of Conditions Precedent
>
> 3.3 The terms and conditions set out in Schedule 1 hereof are inserted for the sole benefit of the Lender and may be waived by the Lender in whole or in part with our without terms or conditions without prejudicing the right of the Lender to assert such terms and conditions in whole or in part in respect of subsequent utilization of the Facility.
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> 4. Utilisation
>
> 4.1 Conditions
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> If:
>
> a) ...;
>
> b) The conditions precedent contained in Schedule 1 have been fulfilled by the Borrower to the satisfaction of the Lender;

c) …;

d) …;

e) …; and

f) ….

then, subject to provisions of this Agreement, and in particular to the specific conditions set out in relation to the particular Facility the Borrower may on a Business Day during the tenure of the Facility or the Availability Period (as the case maybe) utilise and/ or continue to utilise the Facility.

Schedule 1

(Referred to in Clause 3.1)

Condition Precedent

1) …;

2) …;

3) …;

4) …;

5) …;

6) …;

7) …;

8) …;

9) …;

10) …;

11) …;

12) Any further conditions as advised by solicitors of the Lender which may be necessary to perfect the security in favour of the Lender or which a reasonable prudent Lender may require.

13) The Lender having received written confirmation from the Lender's solicitors:

A i) The security Documents have been duly executed and have been stamped;

ii) …;

iii) The relevant statement of charge in respect of the
B security provided by the Borrower has been filed for registration as required under section 108 of the Companies Act, 1965;

iv) …;

C v) …;

a) …;

b) …; and

D c) a copy of the Irrevocable Instruction with evidence that the Awarder has forwarded to the PT. Bank Maybank Indocorp duly acknowledged by the client/ principal (P.T Excelcomindo Pratama TBK (XL))

[14] In my judgment, it is evident from the wording of cls. 3.1
E and 3.2 that first, the defendant bank is entitled to insist on compliance by the plaintiff with all the conditions precedent. In the event of any one CP becoming impossible of performance, the defendant is entitled to withdraw the facility altogether since the test of compliance is a subjective test, in this case. I opine to this
F effect because of the following words in cl. 3.1 'in each case in form and content satisfactory to the lender'. The question of the defendant being negligent for including the charge clause in the first instance does not arise because the terms of the contract were mutually agreed between the parties. The plaintiff having
G agreed to the inclusion of the charge clause in the facility agreement cannot now attribute negligence on the part of the plaintiff for its inclusion particularly since the plaintiff was represented by solicitors at the material time and the facility agreement included an 'explanation to the signatories clause' (exh.
H 57 of B1). In my opinion, the submission of counsel for the plaintiff carried to its logical conclusion must imply that a lender must disburse the banking facilities even if the only security to be provided by the borrower becomes impossible of performance. The terms of the contract would invariably include a clause similar to

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cl. 3.3 to provide for this contingency. Secondly, in my opinion, cl. 3.2 of the facility agreement can be said to cater for the very contingency that has arisen on the facts of this case ie, a CP becoming impossible of performance. I opine to this effect because upon the charge clause becoming inoperative, the defendant was entitled to take the position that the plaintiff was no longer in a position to fulfill the CP 'in the manner satisfactory to the lender' and consequently terminate the facility bearing in mind that it was entitled to take this decision 'at its absolute discretion'. I am fortified in coming to this conclusion by the terms of cl. 3.3. This clause stipulates that the defendant is entitled to waive the requirement for the plaintiff to comply with any one CP. In other words, upon the charge clause becoming inoperative, it was open to the defendant to either waive the requirement for compliance or recall the facility pursuant to cl. 3.2. In my judgment, the plaintiff must have also understood cl. 3.3 in this manner and, hence, the plaintiff's letter to the defendant dated 27 May 2009 (exh. 216 of encl. B1) seeking a waiver by the defendant for compliance with the charge clause. The defendant in the exercise of the 'absolute discretion' conferred upon it by cl. 3.2 resolved to act otherwise and, in my opinion, it was well within the province of the defendant to do so. Thirdly, on the fact of this case, the defendant was entitled to include fresh requirements to fortify its already existing security (see cl. 12 of Schedule 1). This clause read together with cl. 3.3 implies that upon the charge clause being rendered inoperative, it was open to the defendant to either waive the requirement for compliance with the charge clause or impose new conditions or recall the facilities pursuant to cl. 3.2. Finally, there is (iii) of cl. 13 which required confirmation from the defendant's solicitors of compliance by the plaintiff with the charge clause before there was to be any disbursement of the banking facilities. Irrespective of the reasons why the plaintiff was incapable of performing this CP, the defendant was entitled to withhold the release of the facilities upon the solicitors refusing to provide such confirmation. In my judgment, the defendant cannot be said to be in breach of contract so long as the confirmation of compliance was not forthcoming in the defendant's solicitor's letter as envisaged in cl. (iii). There was no such letter of confirmation from the solicitors for obvious reasons.

A B C D E F G H I

[15] The second case relied upon by counsel for the plaintiff was the case of *Lee Chong Lim v. Standard Chartered Bank Malaysia Bhd* [2004] 6 CLJ 447. This case revolved around the interpretation of s. 4.04 and s. 7.01(a) of the Contract between the bank and its customer. The two sections read as follows:

S. 4.04

Notwithstanding any other provisions in this Agreement to the contrary, it is hereby expressly agreed and declared that each Facility may be reviewed and or amended and or varied from time to time and at any time by the Bank irrespective or whether or not an Event of Default had occurred and nothing in these presents contained shall be deemed to impose on the Bank any obligation either at law or in equity to continue to make any Advance thereunder to the Borrower or to any person or party.

S. 7.01(a)

Without prejudice to s. 14.02, each of the Term Loan so far as not otherwise or discharged under the provisions of this Agreement shall be repaid by the borrower on demand by the Bank which demand may be made by the Bank at any time or from time to time at the Bank's sole and absolute discretion irrespective of whether an event of default has occurred or continuing and without any obligation to give any reasons therefore and until such demand is made, the borrower shall repay such terms together with interest thereon at the relevant Prescribed Rte by the relevant installments timeously and on each of the relevant installment Payment dates without notice from the Bank such that such Term Loan and all accrued interest thereon shall have been fully repaid to an settled with the Bank.

The court was required to determine whether the lender bank could recall its facilities pursuant to either one or both of these sections. His Lordship had this to say on this issue:

Section 4.04 speaks of the right of the Defendant to review, amend or vary the loan from time to time and section 7.01(a) speaks of the right of the Defendant to require the Plaintiff to repay the loan on demand. Clearly, the right of the Defendant to reviews, amend or vary, and to demand the repayment of the loan under the two provisions was meant to be operative only after the Defendant had performed its obligation, that is to say, only after the Defendant had fully disbursed the loan – for common sense dictates that such acts could only be undertaken after the fact.

> Both the provisions, it is clear, do not provide the Defendant with the right to abdicate its obligation to provide the loan. Having committed itself to provide the Plaintiff the term loan, the Defendant was duty bound to complete its obligation to disburse the loan under the agreement, before it is competent to invoke its right under section 4.04 and section 7.01(a).
>
> To interpret the two provisions as enabling the Defendant to recall the loan at will even before it was fully disbursed would tantamount to conferring upon it a *carte-blanch*e to break a concluded contract at will without having to incur a liability – an act wholly repugnant to the law of contract.

[16] With respect, the *ratio* of *Lee Chong Lim* is not applicable to the facts of this case as the recall of the facilities, in this case, was not pursuant to a clause of similar effect but by reason of the failure of the plaintiff to fulfill a condition precedent.

[17] The third case relied upon by counsel for the plaintiff was the case of *Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32. With reference to certain pronouncements of Ramli Ali J (as he then was), counsel for the plaintiff submitted that the defendant owed fiduciary duties to the plaintiff. According to counsel for the plaintiff, the defendant's failure to advice the plaintiff of the impossibility of performance of the charge clause and thereafter recall the facility based on non-performance of the charge clause constituted a breach of the plaintiff's fiduciary duties to the defendant.

[18] With respect, I do not understand the judgment of Ramli Ali J as authority for any such proposition. My understanding of the judgment of His Lordship is that in a traditional banking facility arrangement, the relationship between the bank and its customer is that of a debtor and creditor only. The bank is the debtor and the customer is the creditor. The relationship between the bank and its customer may change and give rise to fiduciary relationship but only in cases where the bank provides financial and advisory services. Accordingly unless the bank provides these additional services, the relationship remains one of a debtor and creditor only (see paras. f-g of p. 52 of the reported judgment of the court).

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Conclusion

[19] Since none of the cases cited by counsel for the plaintiff support the conclusion that the defendant was either negligent or in breach of contract in recalling the banking facilities for the plaintiff's non-compliance with the charge clause, I dismiss the plaintiff's claim with costs. Since the defendant indicated at the outset of the trial that it is not pursuing its counter-claim, I dismiss the counter-claim with no order as to costs. I order the plaintiff to pay costs of RM20,000 to the defendant.

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